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Ventures, Inc. and Steve Vachani  
16

17 UNITED STATES DISTRICT COURT  
18  
NORTHERN DISTRICT OF CALIFORNIA

19 FACEBOOK, INC.,

20 Plaintiff,

21 -against-

22 POWER VENTURES, INC. d/b/a POWER.COM, a  
California corporation; POWER VENTURES, INC.  
23 a Cayman Island Corporation, STEVE VACHANI,  
an individual; DOE 1, d/b/a POWER.COM, an  
individual and/or business entity of unknown nature;  
24 DOES 2 through 25, inclusive, individuals and/or  
business entities of unknown nature,

25  
26 Defendants.

27 Case No. 5:08-CV-05780 JW  
28

**DEFENDANTS' OPPOSITION TO  
FACEBOOK INC.'S MOTION FOR  
ADMINISTRATIVE RELIEF  
PURSUANT TO CIVIL LOCAL  
RULE 7-11 FOR LEAVE TO FILE  
SUPPLEMENTAL MATERIALS IN  
SUPPORT OF MOTIONS FOR  
PARTIAL SUMMARY JUDGMENT  
AND OPPOSITION TO  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

1           **I.       ARGUMENT**

2           **A.       The Supplemental Materials Were Available To Facebook When It Filed Its**  

3           **Motions For Summary Judgment**

4           Facebook seeks to introduce “new evidence” in support of its summary judgment motions  
 5 and its opposition to defendants’ motion for summary judgment. Facebook’s Motion at 1. This  
 6 evidence, however, is not new and was available to Facebook before it filed its two summary  
 7 judgment motions. In fact, Facebook had the ability to conduct a thorough review of Power’s  
 8 document production prior to filing its summary judgment motions. The Court had set March 19,  
 9 2012 as the last to for hearing dispositive motions. *See* 9/9/11 Order Granting Motion to Enlarge  
 10 Time, Dkt. No. 142 at 2 (“The last date for hearing dispositive motions shall be March 19, 2012.”).  
 11 Discovery was not over. Facebook could have waited until February to file its motions, but it  
 12 chose to file them in November instead.

13           Facebook also had all of the “new evidence” before it filed its motions. Power produced its  
 14 source code on August 25, 2011. *See* Exh. B to the 11/14/11 Declaration of Lawrence Melling,  
 15 Dkt. No. 217 (inspection log showing that Mr. Melling began reviewing Power’s source code on  
 16 August 25 and reviewed the code 22 times prior to the date of his declaration). On October 24,  
 17 Power produced its subversion repository (“SVN”) and the entirety of its databases. *See* Exh. A to  
 18 the Fisher Decl. (10/24/11 letter to Facebook’s counsel regarding 109 gigabyte production of  
 19 Power’s database and repositories). Facebook knew this production included over 100 gigabytes of  
 20 data. *See* Facebook’s Motion at 1. On November 9, 2011, Steve Vachani produced the entirety of  
 21 his emails. *Id.* at 2. Facebook knew this production included over 300,000 emails. *Id.* Facebook  
 22 then decided to file its summary judgment motions on November 14 and 17, 2011. Dkt. Nos. 214  
 23 and 215.

24           Facebook has no excuse for its failure to adequately review Power’s document productions  
 25 prior to filing. Facebook blames its failure on Power for “significant delays in producing  
 26 evidence.” Facebook’s Motion at 5. However, Facebook’s argument is incorrect. First, Power did  
 27 not delay discovery. Before Facebook filed its motions, Power produced *everything* in its  
 28 possession -- its source code, its databases, its SVN, its internal memoranda, and the entirety of

1 Steve Vachani's emails, both personal and professional. Fisher Decl. at ¶ 2. Facebook complains  
 2 that "as a consequence of Defendants' delays in production, Facebook was unable to schedule  
 3 Power's deposition until January 9, 2012—well after the parties had filed their motions."  
 4 Facebook's Motion at 5. But Power offered to conduct Mr. Vachani's deposition as early as  
 5 November 15. Exh. B to the Fisher Decl. Facebook voluntarily chose to wait until January 9. *Id.*  
 6 ("Also, upon further reflection, I believe Mr. Vachani's deposition should only be scheduled once  
 7 we receive Magistrate Judge Spero's ruling on the two motions to compel that are set for hearing  
 8 next Friday. . . . At this point, therefore, you need not worry about seeing if Mr. Vachani is  
 9 available on November 14.").

10 Similarly, Facebook argues it should be excused because Power's productions were  
 11 voluminous and required translation. Facebook's Motion at 5. That argument is flawed. Facebook  
 12 could have taken the time to adequately review Power's productions. Facebook was not required  
 13 to file its summary judgment motions until February 13, 2012. It chose not to do so. The Court  
 14 should not use its discretionary power to fix Facebook's tactical blunder.

15       **B. The Supplemental Materials Are Repetitive and Add Nothing New To**  
 16       **Facebook's Arguments**

17 Facebook seeks to add more of the same to the record. The supplemental materials add  
 18 nothing of value. Facebook does not explain how the supplemental materials would change any of  
 19 its arguments.

20 Facebook contends the supplemental materials support its latest "circumvention theory" --  
 21 that Power designed its browser to circumvent an IP block that Facebook or some other social  
 22 networking site might utilize someday. Facebook's Motion at 1. But Facebook already briefed  
 23 that argument in its December 12 opposition to Power motion for summary judgment. Dkt. No.  
 24 221 at 1-4; *see also id.* at 2-3, fn. 1 ("Defendants did not make any effort to circumvent Facebook's  
 25 blocks at that time, however, only because their circumvention measures had already been written  
 26 into the PowerScript and no further efforts were required for them to continue to access the  
 27 Facebook website."). It also briefed this argument in its motion for summary judgment under the  
 28

1 CFAA and Penal Code § 502 and its corresponding reply. Dkt. No. 214 at 1, 5, 6; Dkt No. 245 at  
 2 1-4, 8.

3 Facebook also argues this evidence establishes that “Power paid its users to recruit  
 4 Facebook users via Event Invitation messages using the Facebook system.” Facebook’s Motion at  
 5 1. Once again, that is not new information. Facebook briefed that argument in its first motion for  
 6 summary judgment under the CAN-SPAM Act and its corresponding reply. Dkt. No. 215 at 5-8,  
 7 13-15, 17-18 (“Power offered its users \$100 in exchange for their successfully inviting Facebook  
 8 users to sign up for power.com.”); Dkt. No. 244 at 4-5. Facebook also briefed that argument in its  
 9 opposition to Power’s motion for summary judgment. Dkt. No. 221 at 6-7.

10 Facebook claims that this evidence “was unavailable and unknown to Facebook at the time  
 11 it filed its Motions for Partial Summary Judgment and its Opposition to Defendants’ Motion for  
 12 Summary Judgment.” Facebook’s Motion at 1. That is incorrect. To the contrary, Facebook  
 13 briefed these points in *five* separate summary judgment memoranda.

14 **C. This Motion Comes At The Eleventh Hour**

15 Facebook filed this motion after the close of business on Friday, January 20, 2012. The  
 16 Court conducted its hearing on the summary judgment motions the following Monday, January 23.  
 17 There is no reason why Facebook filed this motion less than one business day before the hearing.  
 18 Facebook received Power’s source code, databases, and SVN over three months ago. Facebook  
 19 received Steve Vachani’s emails over two months ago. Facebook’s motions for summary  
 20 judgment have been on file for over two months. Facebook could have filed this motion any time  
 21 in the past two months.

22 **D. Power Will Be Prejudiced If The Court Grants Facebook’s Request for Leave  
 23 To File Supplemental Materials**

24 Contrary to Facebook’s assertion, Power will be prejudiced if the Court permits Facebook  
 25 to file additional evidence, after the hearing, without any opportunity to respond. If the Court  
 26 grants Facebook’s motion, Power respectfully requests the opportunity to respond to the “new”  
 27 evidence, as well as the opportunity to file its own supplemental materials.

## **II. CONCLUSION**

For the foregoing reasons, Power respectfully requests that the Court deny Facebook's Motion for Leave to File Supplemental Materials.

Dated: January 24, 2012

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By: /s/ L. Timothy Fisher

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